

No. 3550

United States
Circuit Court of Appeals
For the Ninth Circuit.

E. E. YOUNG,

Plaintiff in Error,

vs.

CALIFORNIA STATE BOARD OF PHARMACY, E. T. OFF, G. M. SUTHERLAND, J. G. McKOWN, H. J. FINGER, E. J. MOLONY, H. O. BUKER, J. S. O'CALLAGHAN, H. M. MEADER and RAYMOND G. LINDLEY, Individually and as Members Constituting the said CALIFORNIA STATE BOARD OF PHARMACY,

Defendants in Error.

Supplemental Transcript of Record.

Upon Writ of Error to the Southern Division of the
United States District Court of the
Northern District of California,
Second Division.

FILED

OCT 26 1920

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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In the Southern Division of the District Court of
the United States, in and for the Northern Dis-
trict of California, Second Division.

16,253.

ACTION FOR CONVERSION

\$25,000.00.

E. E. YOUNG,

Plaintiff,

vs.

CALIFORNIA STATE BOARD OF PHAR-
MACY and E. T. OFF, G. M. SUTHER-
LAND, J. O. McKOWN, H. J. FINGER,
E. J. MALONY, H. O. BUKER, J. S.
O'CALLAGHAN, H. B. MEADER and
RAYMOND G. LINDLEY, Individually
and as Members Constituting the Said CALI-
FORNIA STATE BOARD OF PHAR-
MACY,

Defendants.

Complaint.

Plaintiff complains of defendants and each of
them and for cause of action alleges:

I.

That at all times hereinafter mentioned the de-
fendant, California State Board of Pharmacy, was,
ever since has been, and now is a duly organized
and constituted board under the laws of the State
of California, and having its principal place of
business in the City and County of San Francisco,

in said state, and within the jurisdiction of the above-entitled court.

II.

That on the 16th day of April, 1915, the defendants, E. T. Off and J. O. McKown, H. J. Finger, E. J. Malony and J. S. O'Callaghan, were, ever since have been and now are members of the defendant, California State Board of Pharmacy.

III.

That on the 16th day of April, 1915, the defendants, G. M. Sutherland and H. O. Buker, were, and for some period subsequent to said date, the exact date being unknown to plaintiff, members of said defendant, California State Board of Pharmacy.

IV.

That defendants, H. B. Meader and Raymond G. Lindley, are now and have been for some time last past, the exact date being unknown to plaintiff, members of said defendant, California State Board of Pharmacy.

V.

That on the 16th day of April, 1915, and up to on or about September, 1915, plaintiff and one C. F. McGinis were the owners of the following described personal property, to wit:

115 Ozs. of Morphine Sulphate,

185 Ozs. of Cocaine,

2 Lbs. of Gum Opium,

and from on or about said month of September, 1915, plaintiff was, ever since has been and now is the sole owner of said personal property.

VI.

That on or about the 16th day of April, 1915, defendants above named, at the City of Calexico, County of Imperial, State of California, seized said personal property in the office of W. I. McCoy, a regularly and duly licensed custom-house broker, claiming that said plaintiff and said C. F. McGinis on or about the 16th day of April, 1915, at said city of Calexico, willfully and unlawfully had in their possession said personal property, in violation of section 8 of an act entitled "An act to regulate the sale and use of poisons in the State of California, and providing a penalty of the violation thereof," approved March 5, 1907, amended and approved March 19, 1909, amended and approved April 25, 1911, amended and approved June 11, 1913; and that said plaintiff and said C. F. McGinis did not receive or obtain said property upon the written order or prescription of a physician, dentist, or veterinary surgeon licensed to practice in the State of California; and that said plaintiff and said C. F. McGinis were not then and there manufacturers, jobbers, or wholesalers to pharmacists; and that said plaintiff and said C. F. McGinis were not then and there retail registered pharmacists, or physicians, or assistant registered physicians, or pharmacists, or dentists, or veterinary surgeons licensed to practice in the State of California, as defined by said section 8 of said act; and on said 16th day of April, 1915, a complaint was sworn to by Roy Jones, an inspector for said defendants, charging said plaintiff and said C. F. McGinis with the willful

and unlawful possession of said opium at the said City of Calexico, on or about the said 16th day of April, 1915, in violation of the provisions of said section 8 of said act hereinabove referred to, which said complaint was sworn to before J. B. Hoffman, Justice of the Peace of the Justice's Court of Calexico Township, County of Imperial, State of California, and thereupon a warrant was issued by said Justice of the Peace, and thereafter said plaintiff and said C. F. McGinis were arrested. That on said 16th day of April, 1915, a complaint was sworn to by Roy Jones, an inspector for said defendants, charging said plaintiff and said C. F. McGinis with the willful and unlawful possession of said morphine sulphate at the said City of Calexico, on or about the said 16th day of April, 1915, in violation of the provisions of said section 8 of said act hereinabove referred to, which said complaint was sworn to before J. B. Hoffman, Justice of the Peace of the Justice's Court of Calexico Township, County of Imperial, State of California, and thereupon a warrant was issued by said Justice of the Peace and thereafter said plaintiff and said C. F. McGinis were arrested. That on said 16th day of April, 1915, a complaint was sworn to by Roy Jones, an inspector for said defendants, charging said plaintiff and said C. F. McGinis with the willful and unlawful possession of said cocaine at the said City of Calexico, on or about the said 16th day of April, 1915, in violation of the provisions of said section 8 of said act hereinabove referred to, which said complaint was sworn to before J. B.

Hoffman, Justice of the Peace of the Justice's Court of Calxico Township, County of Imperial, State of California, and thereupon a warrant was issued by said Justice of the Peace, and thereafter said plaintiff and said C. F. McGinis were arrested.

VII.

That said section 8 of said act hereinbefore referred to is in part in the words and figures following, to wit:

“It shall be unlawful for any person, firm or corporation to sell, furnish or give away or offer to sell, furnish or give away or to have in their or his possession any cocaine, opium, morphine, codeine, heroin, alpha eucaine, beta eucaine, nova caine, flowering tops and leaves, extraeta, tinctures and other narcotic preparations of hemp or loco weed (*Cannabis sativa*), Indian hemp, or chloral hydrate or any of the salts, derivatives or compounds of the foregoing substances or any preparation or compound containing any of the foregoing substances or their salts, derivatives or compounds excepting upon the written order or prescription of a physician, dentist or veterinary surgeon, licensed to practice in this state, which order or prescription shall be dated and shall contain the name of the person for whom prescribed, written in by the person writing the prescription, or if ordered by a veterinary surgeon it shall state the kind of animal for which ordered and shall be signed by the person giving the prescription or order * * * provided, that

the above provisions shall not apply to sales at wholesale by jobbers, wholesalers and manufacturers to pharmacies, as defined in section one of an act entitled 'An act to regulate the practice of pharmacy in the State of California and to provide a penalty for the violation thereof; and for the appointment of a board to be known as the California State Board of Pharmacy,' approved March 20, 1905, and acts amendatory thereof; or physicians, nor to each other, nor to the sale at retail in pharmacies by pharmacists to physicians, dentists or veterinary surgeons duly licensed to practise in this state; provided, further, that all such wholesale jobbers, wholesalers and manufacturers, in this section mentioned shall keep in a manner readily accessible, the written orders or blank forms required to be preserved under the provisions of section two of the act of congress approved December 17, 1914, relating to the production, importation, manufacture, compounding, sale, dispensing or giving away of opium or coco leaves and salts, derivatives or preparations. * * * ''

VIII.

That on or about the 14th day of May, 1915, upon their pleas of not guilty, said plaintiff and said C. F. McGinis were tried jointly by a jury in said Justice's Court upon the charge involving the possession of said opium, and were thereupon convicted, and thereafter, said plaintiff and said C. F. McGinis moved for a new trial, which said motion

was denied, and thereupon a judgment of fine and conviction was entered in said opium case; thereafter an appeal was taken in said opium case, to the Superior Court of the State of California, in and for the County of Imperial, from the order denying the motion for new trial from the judgment of said Justice's Court; thereafter said appeal was dismissed and the judgment of conviction of the violation of said section eight was affirmed with slight modifications. Thereafter said plaintiff and said C. F. McGinis sued out a writ of error in the Supreme Court of the United States, to the said Superior Court of the County of Imperial, State of California; that thereafter and after argument of said case in said Supreme Court of the United States, said judgment of said Superior Court of the County of Imperial, State of California, was on the 20th day of May, 1918, reversed by said Supreme Court of the United States, and the case remanded for further proceedings not inconsistent with the opinion rendered in said case by said Supreme Court of the United States. That thereafter and on the 9th day of June, 1919, said opium case was dismissed against said C. F. McGinis, and was tried by a jury as against said plaintiff, and after submission of said case, a verdict of acquittal was rendered by said jury in favor of said plaintiff.

IX.

That on or about the 17th and 18th days of May, 1915, upon their pleas of not guilty, said plaintiff and said C. F. McGinis were tried jointly by a jury in said Justice's Court upon the charge involving

the possession of said cocaine, and were thereupon convicted, and thereafter, said plaintiff and said C. F. McGinis moved for a new trial, which said motion was denied, and thereupon a judgment of fine and conviction was entered in said cocaine case; thereafter an appeal was taken in said cocaine case, to the Superior Court of the State of California, in and for the County of Imperial, from the order denying the motion for new trial from the judgment of said Justice's Court; thereafter said appeal was dismissed and the judgment of conviction of the violation of said section eight was affirmed with slight modifications. Thereafter said plaintiff and said C. F. McGinis sued out a writ of error in the Supreme Court of the United States, to the said Superior Court of the County of Imperial, State of California; that thereafter and after argument of said case in said Supreme Court of the United States, said judgment of said Superior Court of the County of Imperial, State of California, was on the 20th day of May, 1918, reversed by said Supreme Court of the United States, and the case remanded for further proceedings not inconsistent with the opinion rendered in said case by said Supreme Court of the United States. That thereafter and on the 10th day of June, 1919, said cocaine case was dismissed against said plaintiff and said C. F. McGinis.

X.

That on or about the 15th day of May, 1915, upon their pleas of not guilty, said plaintiff and said C. F. McGinis were tried jointly by a jury in said

Justice's Court upon the charge involving the possession of said morphine, and after submission of said case, the jury in said case disagreed and said jury was discharged; and thereafter and on or about the 14th day of April, 1919, and on motion of said plaintiff and said C. F. McGinis, said Justice's Court dismissed said morphine case for want of prosecution.

XI.

That on or about the 16th day of April, 1915, and at the time of the seizure hereinbefore mentioned, certain of said personal property hereinbefore described, to wit: one hundred ounces (100 ozs.) morphine sulphate, one hundred ounces (100 ozs.) cocaine, and two pounds (2 lbs.) gum opium, were in transitu in interstate and foreign commerce from J. S. Merrill Drug Co., St. Louis, Missouri, to said plaintiff and said C. F. McGinis, the consignees of said goods herein mentioned, in Mexicali, Northern District of Baja California, Republic of Mexico, through Wells Fargo & Co. Express and said W. I. McCoy.

XII.

That on or about the 16th day of April, 1915, and at the time of the seizure hereinbefore referred to, certain of said personal property hereinbefore described, to wit: fifteen ounces (15 ozs.) of morphine sulphate and eighty-five ounces (85 ozs.) of cocaine were in transitu in interstate and foreign commerce from The Western Wholesale Drug Co., Los Angeles, California, to said plaintiff and said C. F. McGinis, the consignees of said goods herein men-

tioned, in Mexicali, Northern District of Baja California, Republic of Mexico, through Wells Fargo & Co. Express and said W. I. McCoy.

XIII.

That the highest market value of said personal property hereinabove described was on or about the month of September, 1918, the sum of Six Thousand (\$6,000.00) Dollars.

XIV.

That said plaintiff has expended, and become obligated to pay in the pursuit of said personal property hereinabove referred to, the sum of Seven Thousand (\$7,000.00) Dollars, which said sum is a fair compensation for the time and money expended in the pursuit of said personal property.

XV.

That said defendants, during all of said proceedings hereinabove mentioned, employed special counsel in said proceedings to represent said defendants.

XVI.

That said seizure on the 16th day of April, 1915, hereinbefore mentioned, was made by said defendants willfully, intentionally, and without just cause or provocation therefor, maliciously and without the consent of said plaintiff or said C. F. McGinis, and ever since and is now willful, intentional, and without just cause or provocation therefor, with malice and without the consent of said plaintiff or said C. F. McGinis.

XVII.

That in the seizure by said defendants of said

personal property hereinbefore mentioned, and the acts and conduct of the said defendants and each of them since said seizure against said plaintiff, during all the proceedings hereinbefore set forth, said defendants and each of them have been guilty of oppression and malice against said plaintiff, and that by reason thereof plaintiff asks in addition to actual damages hereinbefore set forth, the sum of Twelve Thousand (\$12,000.00) Dollars as punitive damages.

XVIII.

That no part of the amounts herein set forth have been paid, and the whole thereof are now due, owing and unpaid.

XIX.

That plaintiff is informed and believes and therefore alleges that said personal property has been destroyed by said defendants and each of them, and cannot be returned by said defendants or either of them to said plaintiff, or recovered by said plaintiff from said defendants or either of them.

WHEREFORE plaintiff prays judgment against said defendants and each of them for

(1) The sum of Six Thousand (\$6,000.00) Dollars, the highest market value of said personal property as set forth in the complaint, or such other sum as may be the highest market value up to the time of the verdict.

(2) The sum of Seven Thousand (\$7,000.00) Dollars, as a fair compensation to said plaintiff in the pursuit of said personal property.

(3) For the sum of Twelve Thousand (\$12,000.00) Dollars, as punitive damages.

(4) For costs of suit.

WILLIAM SEA, Jr.,
SAMUEL T. BUSH,
Attorneys for Plaintiff.

United States of America,
State and Northern District of California,
City and County of San Francisco,—ss.

William Sea, Jr., being first duly sworn, deposes and says: That he is the attorney for the plaintiff named in the foregoing complaint; that plaintiff resides in the City of Calexico, County of Imperial, State of California, and without the Southern Division of the Northern District of California, where affiant has his law office in the City and County of San Francisco, in said Southern Division of the Northern District of California; and for that reason affiant makes this verification.

That he has read the foregoing complaint and knows the contents thereof; and that the same is true of his own knowledge except as to the matters therein stated on information and belief; and as to those matters that he believes it to be true.

WILLIAM SEA, Jr.

Subscribed and sworn to before me this 21st day of June, 1919.

[Seal] LOUISE BEARDEN,
Notary Public in and for the City and County of
San Francisco, State of California.

[Endorsed]: Filed Jun. 24, 1919. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk.

In the Southern Division of the District Court of
the United States, in and for the Northern Dis-
trict of California, Second Division.

No. 16,253.

E. E. YOUNG,

Plaintiff,

vs.

CALIFORNIA STATE BOARD OF PHAR-
MACY and E. T. OFF, G. M. SUTHER-
LAND, J. O. McKOWN, H. J. FINGER,
E. J. MALONEY, H. O. BUKER, J. S.
O'CALLAGHAN, H. B. MEADER and
RAYMOND G. LINDLEY, Individually
and as Members Constituting the Said
CALIFORNIA STATE BOARD OF
PHARMACY,

Defendants.

Amended Demurrer of Defendant E. T. Off, Individually.

The defendant E. T. Off individually hereby
demurs to the complaint filed in the above-entitled
action upon the following grounds: That it ap-
pears upon the face of said complaint

I.

That the above-entitled court has no jurisdiction
of the person of the defendant, or the subject of
the action.

II.

That the plaintiff has not legal capacity to sue
in the above-entitled action.

III.

That the complaint does not state facts sufficient to constitute a cause of action against said defendant.

IV.

That plaintiff is not entitled to the relief prayed for.

V.

That the Court has no jurisdiction in the premises.

VI.

That said complaint and the cause of action therein attempted to be stated is barred by the statute of limitations.

VII.

That said complaint is ambiguous because it cannot be ascertained therefrom whether the seizure of personal property therein attempted to be stated was made by said defendant Off in his individual capacity, or in his capacity as a member of said California State Board of Pharmacy, and in what the distinction in the manner of seizure in either capacity exists.

VIII.

That said complaint is uncertain for the reason set forth in paragraph VII hereof.

IX.

That said complaint is unintelligible for the reason set forth in paragraph VII hereof.

WHEREFORE said defendant E. T. Off individually prays that plaintiff take nothing by his

complaint filed herein, but that said action be dismissed.

JOHN F. DAVIS,
Attorney for said Defendant E. T. Off Individually.

I hereby certify that in my opinion the above and foregoing amended demurrer is well taken in point of law and is not interposed for the purpose of delay.

JOHN F. DAVIS,
Attorney for said Defendant E. T. Off Individually.

[Endorsed]: Filed August 4, 1919. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk.

In the Southern Division of the District Court of
the United States, in and for the Northern Dis-
trict of California.

No. 16,253.

E. E. YOUNG,

Plaintiff,

vs.

CALIFORNIA STATE BOARD OF PHAR-
MACY and E. T. OFF, G. M. SUTHER-
LAND, J. O. McKOWN, H. J. FINGER,
E. J. MALONY, H. O. BUKER, J. S.
O'CALLAGHAN, H. B. MEADER and
RAYMOND G. LINDLEY, Individually
and as Members Constituting the said
CALIFORNIA STATE BOARD OF
PHARMACY,

Defendants.

**Amended Demurrer of Defendants California State
Board of Pharmacy et al.**

Leave of Court having been heretofore granted, the defendants, California State Board of Pharmacy and E. T. Off, J. O. McKown, H. J. Finger, E. J. Malony, J. S. O'Callaghan, H. B. Meader and Raymond G. Lindley, sued herein as members of said board, and appearing herein in their representative capacities as members of said board and not in their individual capacities, hereby file their amended demurrer to the complaint filed in the above-entitled action upon the following grounds:

That it appears upon the face of said complaint,

I.

That the above-entitled court has no jurisdiction of the persons of said defendants, or of any of them, or of the subject of the action.

II.

That the plaintiff has not legal capacity to sue in the above-entitled action.

III.

That the complaint does not state facts sufficient to constitute a cause of action as against said defendants, or any of them.

IV.

That said complaint is uncertain in that it cannot be ascertained therefrom under what law, if any, of the United States the matter in controversy set forth in said complaint arises, or in what manner the matter in controversy set forth in said complaint

involves the construction of any law of the United States.

V.

That the complaint does not state facts sufficient to constitute a cause of action against said defendants, or any of them, in this, that the alleged cause of action appears to be barred by the provisions of section 338, subdivision 3, of the Code of Civil Procedure of the State of California.

WHEREFORE said defendants pray that plaintiff take nothing by his complaint filed herein, but that said action be dismissed.

U. S. WEBB,

Attorney General of the State of California, and
Attorney for said Defendants.

JOHN F. DAVIS,

Of Counsel for said Defendants.

I hereby certify that in my opinion the above and foregoing amended demurrer is well taken in point of law and is not interposed for the purpose of delay.

U. S. WEBB,

Attorney for said Defendants.

[Endorsed]: Received a copy of the within amended demurrer this 7th day of August, 1919.

WILLIAM SEA, Jr.

SAMUEL T. BUSH,

Attorneys for Plaintiff.

Filed Aug. 18, 1919. Walter B. Maling, Clerk.

At a stated term, to wit, the November term, A. D. 1919, of the Southern Division of the United States District Court for the Northern District of California, Second Division, held at the courtroom in the City and County of San Francisco, on Monday, the 22d day of December, in the year of our Lord one thousand nine hundred and nineteen. Present: The Honorable WILLIAM C. VAN FLEET, District Judge.

No. 16,253.

E. E. YOUNG

vs.

CALIFORNIA STATE BOARD OF PHARMACY et al.

Minutes of Court—December 22, 1919—Order Sustaining Amended Demurrers.

The amended demurrers to the complaint, heretofore heard and submitted, being now fully considered and the Court having rendered its oral opinion, it is ordered that said amended demurrers be and the same are hereby sustained.

In the Southern Division of the United States District Court for the Northern District of California, Second Division.

Hon. WM. C. VAN FLEET, Judge.

16,253—16,256.

E. E. YOUNG,

Plaintiff,

vs.

CALIFORNIA STATE BOARD OF PHARMACY et al.

Defendants.

Opinion.

Monday, December 22, 1919.

WM. SEA, Jr., SAMUEL T. BUSH, for Plaintiff.
ATTORNEY GENERAL, STATE OF CALIFORNIA, and JOHN F. DAVIS, for Defendants.

The COURT (Orally): The action numbered 16,253 is brought against the State Board of Pharmacy and the individual members thereof for the recovery of damages for the conversion of certain goods seized by the defendants, purporting to proceed under the State Poison Act, the goods being certain drugs falling within the provisions of that act, if the seizure was authorized. The seizure was made at Mexicali on the Mexican border in April, 1915, and this action was brought and filed on June 24th, 1919.

The defendants have interposed a demurrer on the grounds, among others, that the complaint does not state a cause of action, and that the cause of action is without the jurisdiction of this court; and in an amended demurrer they invoke the statute of limitations. The state itself appears through the Attorney General in a separate demurrer and raises the objection that the action, while nominally against the board, is one against the state and cannot be maintained because it is not one as to which the state has consented to be sued. As to this last objection, I am not kindly disposed toward it. The plaintiff's action proceeds upon the theory that the board was in the first place acting without authority of law, and, in the second place, that the act if held to have application to the facts was unconstitutional. Now, a state board acting either under an unconstitutional act or under a valid act in an illegal manner is not, in legal contemplation, acting for the state. The state is not regarded as standing behind the action of a board or officer who is proceeding either in a manner not in accordance with the provisions of a valid statute or under a statute which is invalid, and I am not, therefore, disposed to sustain the objection that the action is one against the state.

I am furthermore of the opinion that as the complaint sets up a cause of action for goods which, it is alleged, were in transit in interstate commerce at the time they were seized by the defendants, the objection that this court has not jurisdiction may not be maintained. Under the law, if the claim of

the plaintiff is good, he had a perfect right under the commerce clause of the constitution to the protection of his goods during the period they were *in transitu*, and that being so, a cause of action arising for an infringement of that right is one arising under the constitution and laws of the United States. That objection, therefore, is not well taken.

As to the statute of limitations, the action arose upon a transaction, as stated, having its inception in April, 1915. The invasion of the rights of the plaintiff occurred, therefore, on that date, and the cause of action counted on was not asserted until June 24th, 1919, when the complaint was filed. The original demurrer filed in the case did not set up the statute of limitations, but leave was asked for the privilege of filing an amended demurrer for the purpose of setting it up and that leave was granted. This was strenuously objected to by the plaintiff upon the ground that the bar of the statute is not favored, and that the amendment was not one which should appeal to the discretion of the court. I am satisfied that there is nothing in that contention under the modern view as to the statute of limitations. It is a defense which makes in favor of peace and one which calls for the prompt prosecution of rights which the law affords. It has come to be rather a favored defense than otherwise; and I am quite satisfied that the discretion of the Court was properly exercised in allowing the demurrer to be amended in that regard. And upon full consideration I have come to the conclusion that under

the law that objection must be sustained. The statute of limitations of the state, for the cause here asserted, is three years from the injury. These courts, under the conformity act, proceed in accordance with the provisions of the statute of the state in all common-law actions where the matter is not expressly provided for in the federal statutes and there is no provision in the federal statutes limiting the time within which an action of this kind may be maintained. Now, the injury counted upon occurred in legal contemplation upon the seizure. At that date plaintiff's rights were invaded and he was entitled at once to bring an action for its redress. He was not required or permitted to wait the issue as to whether his goods were properly seized; that merely involved a question of the damage he had suffered, and he is not entitled to refer his action until his ultimate damage has been ascertained, but he must assert his rights immediately or within the period which the statute prescribes. I am, therefore, satisfied that the action comes too late as being barred by the statute. The demurrer will accordingly be sustained upon that ground.

Case No. 16,256 is an action for malicious prosecution growing out of the same transaction. It would seem from the allegations that in the seizure of these goods the defendant board, proceeding upon the theory and in the belief, apparently, that they were acting within the provisions of the State Poison Act, had the plaintiff arrested, tried and

convicted as for a violation of the act. The plaintiff set up in the trial court the fact which has been referred to in the other action, that is, that the goods were at the time *in transitu* in interstate commerce, and the trial court in effect ignored this defense. The case was taken by appropriate writ to the Supreme Court of the United States and the judgment convicting the defendant in that case was reversed, the Supreme Court holding, in effect, that the plea that the goods were *in transitu* gave rise to a federal question which could not be ignored and that he was entitled to have it properly presented to the jury and passed upon since the goods would not be within the purview of the State act if they were within the protection of the commerce clause of the constitution, and the cause came back to the state court to be disposed of in accordance with the opinion, where it subsequently was dismissed.

A demurrer is interposed to that complaint upon several grounds, but only two of which are necessary to be noticed. The first is that the Court is without jurisdiction because the action does not arise under the constitution or laws of the United States, and, secondly, that the complaint states no cause of action. I am quite satisfied that both of these objections must be sustained. The fact that the arrest of the plaintiff was had in connection with a transaction which may have involved the seizure of his goods while in transit in interstate commerce and thereby giving him a right of action in the Federal Court as to the damages suffered so

far as his goods are concerned is one thing. This action is for malicious prosecution—in other words, the commission of a tort against the person of the plaintiff and it in no wise attaches to itself the jurisdictional fact which arose as to his goods under the commerce clause of the constitution. It is wholly separate and apart and has nothing to do with it—I mean in any legal sense. Incidentally, his prosecution arose because he was in possession of these goods under circumstances which seemed to warrant the defendants in securing his arrest, but he should have asserted his rights in the state courts, because there rested the remedy, if any, to which he was entitled for the trespass upon his person.

Moreover, the objection to the sufficiency of the complaint as stating a cause of action is, I think, well taken, because the one essential and indispensable prerequisite to the statement of a cause of action for malicious prosecution is that there shall be alleged, and shall appear, a want of probable cause for the prosecution. In this case it appears upon the face of the complaint that not only was the warrant issued at the instance of the defendants here after laying the matter before an officer of the law, but the complaint was entertained and the case went to the point where there was not only a conviction in the trial court but a sustaining of that conviction in the appellate court; and the rule is thoroughly established that where it appears upon the face of the complaint, or appears at the trial, that there has been a sustaining of the act of the party seeking the arrest by either a conviction be-

fore a court or a jury, although such conviction may have been erroneous and subsequently reversed for error, is a complete answer to the objection that there was a want of probable cause; and that being true the complaint shows upon its face an entire want of that essential feature which would give the plaintiff a right of action here, that is, a want of probable cause for the arrest which he asserts to have been a malicious one. For both these reasons the demurrer in that case will be sustained.

[Endorsed]: Filed Jan. 7, 1920. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk.

**Certificate of Clerk U. S. District Court to Supplemental
Transcript of Record.**

United States of America,
Northern District of California,—ss.

I, Walter B. Maling, Clerk of the United States District Court for the Northern District of California, do hereby certify the foregoing to be full, true and correct copies of the original complaint filed June 24, 1919; amended demurrer of defendant E. T. Off, individually, filed August 4, 1919; amended demurrer of defendants California State Board of Pharmacy et al., filed August 18, 1919; order sustaining amended demurrers, made and entered December 22, 1919, and oral opinion filed December 22, 1919, in the cause of E. E. Young, Plaintiff, vs. California State Board of Pharmacy et al. No. 16,253, as the same now remains on file and of record in this office.

ATTEST my hand and the seal of the said United States District Court, Northern District of California, at San Francisco, California, this 22d day of October, A. D. 1920.

[Seal]

WALTER B. MALING,
Clerk.

By J. A. Schaertzer,
Deputy Clerk.

[Endorsed]: No. 3550. United States Circuit Court of Appeals for the Ninth Circuit. E. E. Young, Plaintiff in Error, vs. California State Board of Pharmacy, E. T. Off, G. M. Sutherland, J. G. McKown, H. J. Finger, E. J. Molony, H. O. Buker, J. S. O'Callaghan, H. M. Meader and Raymond G. Lindley, Individually and as Members Constituting the Said California State Board of Pharmacy, Defendants in Error. Supplemental Transcript of Record. Upon Writ of Error to the Southern Division of the United States District Court of the Northern District of California, Second Division.

Filed October 22, 1920.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

In the United States Circuit Court of Appeals, in
for the Ninth Circuit.

No. 3550.

E. E. YOUNG,

Plaintiff in Error,

vs.

CALIFORNIA STATE BOARD OF PHARMACY,
E. T. OFF, G. M. SUTHERLAND, J. G. Mc-
KOWN, H. J. FINGER, E. J. MOLONY, H.
O. BUKER, J. S. O'CALLAGHAN, H. M.
MEADER, and RAYMOND G. LINDLEY,
Individually and as Members Constituting the
said California State Board of Pharmacy,
Defendants in Error.

Stipulation for Filing of Supplemental Record.

It appearing that the printed transcript of record in the above-entitled cause does not contain the following papers and records deemed essential by the defendants in error to a full consideration of said cause by the above-named court, namely:

The original complaint, filed June 26, 1919;

The amended demurrer of defendants California State Board of Pharmacy et al.;

The amended demurrer of defendant E. T. Off, individually;

The minutes of the District Court of December 22, 1919, containing the order sustaining the amended demurrers to said complaint; and

The oral opinion rendered December 22, 1919, and subsequently filed sustaining said amended demurrers to said complaint;

And it further appearing that said papers and records were not by said United States District Court for the Northern District of California, Southern Division, Second Division, transmitted to the above-entitled court or certified thereto as part of the record in said cause pursuant to writ of error heretofore issued therein, and the said parties hereto not waiving in any respect any right which they may respectively have to object to the efficiency, competency, relevancy or materiality of said papers and records or any thereof, but to the end that all of said papers and records may be before the above-entitled court, upon the hearing of said cause for whatever purpose they may legally serve;

It is hereby stipulated by and between the respective parties to the above-entitled cause, by the undersigned, as their attorneys respectively, that a copy of each and all of said papers and records duly certified by the clerk of said District Court under his hand and the official seal of said court, may be transmitted to and filed in the United States Circuit Court of Appeals for the Ninth Circuit as supplemental to the record in said cause heretofore transmitted to said court and to constitute part of the record upon which said cause may be heard, and that when so filed in said court the same may be printed by the clerk thereof if required and used with the transcript of record already printed in said cause.

Dated: October 21st, 1920.

WILLIAM SEA, Jr.,

Attorney for Plaintiff in Error.

U. S. WEBB,

Attorney General of the State of California,

ROBERT W. HARRISON,

Chief Deputy Attorney General of the State of California,

Attorneys for Defendants in Error, California State Board of Pharmacy, E. T. Off, G. M. Sutherland, J. G. McKown, H. J. Finger, E. J. Molony, H. O. Buker, J. S. O'Callaghan, H. M. Meader and Raymond G. Lindley, as Members Constituting the California State Board of Pharmacy.

JOHN F. DAVIS,

Attorney for Defendant in Error, E. T. Off, Individually.

JOHN F. DAVIS,

Of Counsel for State Board of Pharmacy.

[Endorsed]: No. 3550. In the United States Circuit Court of Appeals, in and for the Ninth Circuit. E. E. Young, Plaintiff in Error, vs. California State Board of Pharmacy et al., Defendants in Error. Stipulation for Filing of Supplemental Record. Filed Oct. 22, 1920. F. D. Monckton, Clerk.

